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No. 07-422

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IN THE

Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

Petitioner,

v.

HUGH B. GALLAGHER, III AND JOANNE GALLAGHER, GUARDIANS OF THE ESTATE OF HUGH B. GALLAGHER, IV

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents devote the bulk of their opposition brief to arguing a point that they lost below: whether the Federal Constitution bars awards of punitive damages based on a defendant's acts independent of the acts upon which compensatory liability was premised. This Court answered that question in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003): "A defendant's ... acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." Petitioner relied on *State Farm* in challenging the punitive damages award in the Pennsylvania appellate court, and that court upheld that challenge, and reversed the punitive award, in language drawn virtually verbatim from *State Farm*: "We agree with [petitioner's] contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." Pet. App. 18a.

Accordingly, and contrary to respondents' suggestion, this petition does not present the question whether the punitive damages award in this case is constitutionally invalid under *State Farm*. That question was already decided in petitioner's favor below. Rather, the question presented here is the logically subsequent question of how to redress that federal constitutional error. The problem here is that the constitutionally invalid punitive damages claim tainted the $20 million compensatory damages award in respondents' favor, and that problem was not solved by reversal of the $15,000 punitive damages award in their favor. In analyzing the effect of the *State Farm* error on the compensatory damages award, the Pennsylvania appellate court started from the premise that the constitutional error was harmless, and forced petitioner—the party aggrieved by the error—to prove otherwise. As explained in the petition, that was error, and the decision below squarely conflicts with decisions from other federal and state appellate courts on this important and recurring issue of federal law.

Respondents try their best to downplay the burden of proof issue, relegating it to the last few pages of their opposition brief. According to respondents, there is no problem with presuming that federal constitutional errors in civil cases are harmless, and saddling parties aggrieved by such errors with the burden of proving otherwise. If ever there were a red flag that certiorari is warranted, this is it. This Court's constitutional jurisprudence would be quite hollow if the lower courts could dismiss federal constitutional errors (like the *State Farm* error at issue here) as presumptively harmless in civil cases. Indeed, that approach turns the law upside down: as many federal and state appellate courts have recognized, federal constitutional errors must be presumed harmful, not harmless, in civil as well as criminal cases. Respondents cannot—and do not—contest that point, or deny that this issue presents an important and recurring issue of federal constitutional law. Accordingly, this Court should grant certiorari, and either summarily reverse the judgment or set the case for plenary review.

I. This Court Has Jurisdiction To Review The Federal Questions Decided Below.

As a threshold matter, respondents argue that "[t]his Court lacks jurisdiction under the principles enunciated in *Michigan v. Long*" because "there is not a whiff of federal law in the Superior Court's opinion." Opp. 18, 22. That argument is plainly incorrect.

The whole point of *Michigan v. Long*, 463 U.S. 1032 (1983), is to create a presumption that a state-court decision was based on federal law where there is uncertainty on that score. *See id.* at 1040-41. This is precisely the kind of case for which that presumption was created. The Pennsylvania appellate court acknowledged that petitioner challenged the punitive damages award in this case on the ground that "it is in derogation of *both* controlling federal constitutional law and Pennsylvania law." Pet. App. 16a (emphasis added); *see also id.*

("[Petitioner] argues that *both* federal due process and Pennsylvania law require that a claim for punitive damages must be based upon the conduct causing the specific injury for which liability is being asserted and not upon unrelated conduct occurring post-injury.") (emphasis added).

The Pennsylvania appellate court upheld that challenge without specifying whether it was relying on federal or state law: "We agree with [petitioner's] contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." Pet. App. 18a. That language, as noted above, is drawn almost verbatim from *State Farm*, upon which petitioner relied heavily in its briefs to the Pennsylvania appellate court—indeed, the federal constitutional argument based on *State Farm* was petitioner's lead argument below. *See* Br. for Appellant Temple Univ. Hosp. (12/22/04) at 17-18, 20; Reply Br. for Appellant Temple Univ. Hosp. (2/7/05), at 1-2.

Accordingly, it is at the very least reasonable to assume that the Pennsylvania appellate court accepted petitioner's federal *State Farm* argument. There is absolutely nothing in the opinion to suggest that the Pennsylvania appellate court rejected petitioner's federal constitutional argument and relied solely on state law grounds to overturn the award of punitive damages. Thus, the *Michigan v. Long* presumption applies: "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040-41.

Respondents insist that "the Superior Court did not apply federal law in reaching this decision, either explicitly or implicitly" because that court "neither mentioned *State Farm* nor discussed any of the concepts that have been explored in this Court's punitive damages

jurisprudence." Opp. 20. But *Michigan v. Long* holds that a state court need not clearly and expressly base its decision on federal law for this Court to deem that federal law was the basis for the decision. Quite the opposite: *Michigan v. Long* established the default rule that a state court must "clearly and expressly" say that its decision is "based on bona fide separate, adequate and independent grounds" of state law for this Court to deem that federal law was not the basis for the decision. 463 U.S. at 1040-41; *see also Harris v. Reed*, 489 U.S. 255, 261 (1989) ("Under *Long* ... this Court may reach the federal question on review unless the state court's opinion contains a 'plain statement' that its decision rests upon adequate and independent state grounds.") (internal quotation and brackets omitted). Because the Pennsylvania appellate court said nothing of the sort, and upheld respondents' federal and state law challenge to the punitive damages award by paraphrasing *State Farm*, the presumption is that the court accepted petitioner's federal constitutional argument.

It necessarily follows that the central premise of respondents' brief in opposition—that no *State Farm* error occurred here—is mistaken. Petitioner challenged the punitive damages award here on federal constitutional grounds under *State Farm*, and the Pennsylvania appellate court upheld that challenge. Respondents thus miss the point by arguing that this case "does not even raise a *State Farm* issue, let alone involve a *State Farm* violation." Opp. 25. Respondents did not cross-petition from the Pennsylvania appellate court's reversal of the punitive damages award, and hence that decision is now the settled law of the case. *See, e.g., Bates v. United States*, 522 U.S. 23, 31 n.7 (1997); *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 376 (1990); *Missouri v. Jenkins*, 495 U.S. 33, 41 n.8 (1990); Robert L. Stern *et al.*, *Supreme Court Practice* § 6.35, at 444-49 (8th ed. 2002). Indeed, that decision is the very predicate for the issue presented here: whether a court may presume that a

federal constitutional error in a civil case was harmless, and saddle the party aggrieved by the error with the burden of proving otherwise. Respondents may disagree with petitioner's answer to that question, but they cannot pretend that it is not presented here.

II. The Pennsylvania Appellate Court Violated Due Process By Presuming That The Jury's Consideration Of An Invalid Punitive Damages Claim Was Harmless.

Turning at last to the merits in the last few pages of their brief, respondents suggest that it is perfectly appropriate for courts to deem federal constitutional errors harmless in "a typical civil action," Opp. 32, as opposed to a criminal case or a civil habeas action. According to respondents, petitioner "does not cite even a single instance" in which a court suggested otherwise. *Id.* But even a cursory review of the petition shows that respondents are mistaken.

As noted in the petition, "both federal and state appellate courts have recognized—in sharp contrast to the court below—that 'presuming prejudice, rather than harmlessness, is required by Supreme Court precedent' as a general matter, *in civil as well as criminal cases*, with respect to constitutional errors and other errors affecting substantial rights." Pet. 16-17 (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005) (emphasis added), and citing *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 886 (10th Cir. 2006); *Jerden v. Amstutz*, 430 F.3d 1231, 1240 (9th Cir. 2005); *In re Vanessa M.*, 138 Cal. App. 4th 1121, 1132 (Cal. Ct. App. 2006); *A.B. v. Y.Z.*, 878 A.2d 807, 811-12 (N.J. 2005) (*per curiam*)). None of these cases are criminal cases or civil habeas cases, so respondents' suggestion otherwise is baseless. *Cf. United States v. Gonzalez-Flores*, 418 F.3d 1093, 1099 n.3 (9th Cir. 2005) (emphasizing that, in both criminal and civil cases, the party benefiting from a constitutional error must prove

that it is harmless, and the party aggrieved by the error need not prove that it is harmful).

Those cases are by no means outliers; to the contrary, every federal court of appeals to consider the issue has concluded that federal constitutional errors, or other errors that affect substantial rights, must be deemed harmful, not harmless, unless and until the party that benefited from the error proves otherwise. "Justice Rutledge first expressed th[e] test [for harmless-error review] in *Kotteakos* [*v. United States*, 328 U.S. 750, 765 (1946)], a criminal case, and since then, the majority of our sister circuits have applied it in the civil context." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (*en banc*), *abrogated in part on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (citing *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986); *Lataille v. Ponte*, 754 F.2d 33, 37 (1st Cir. 1985); *Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. Unit A 1981); *Cohen v. Franchard Corp.*, 478 F.2d 115, 125 (2d Cir. 1973)); *see also Jordan v. Medley*, 711 F.2d 211, 218-19 & n.6 (D.C. Cir. 1983) (Scalia, J.) (noting that the *Kotteakos* standard applies in civil as well as criminal cases).[1]

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[1] The Fourth Circuit in *Taylor* "recognize[d] that three circuits have refused to apply the *Kotteakos* standard in the civil context primarily on the basis that proving harmless error in the criminal context as opposed to the civil context should be more difficult given the differing burdens of proof." 193 F.3d at 235 n.10 (citing *United States Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir. 1988); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)). These three cases, however, stand only for the proposition that the standard for proving harmlessness should be whether the error "more likely than not" affected the verdict, as opposed to the semantically

Under the *Kotteakos* standard, the party benefiting from the error must prove that it was harmless. *See, e.g.*, *United States v. Baugham*, 449 F.3d 167, 177 (D.C. Cir. 2006) ("It is firmly established that the government bears the burden of showing the absence of prejudice in harmless error cases ... under *Kotteakos*."). By starting from the presumption that the federal constitutional error here was harmless, and saddling the party aggrieved by the error with the burden of proving otherwise, *see* Pet. App. 5a, 9a, the decision below squarely conflicts with these cases.

Respondents cannot—and do not—make a serious attempt to distinguish such contrary authority, which is not surprising. It is, to say the least, not obvious why federal constitutional errors must be presumed harmful in criminal cases, but may be presumed harmless in civil cases, and respondents suggest no basis for any such distinction. *See, e.g.*, *Taylor*, 193 F.3d at 235 ("[W]e can fathom no sound justification for using a different test for determining whether a lower court's error affected an appellant's substantial rights in the civil context as

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different *Kotteakos* standard. *See United States Indus.*, 854 F.2d at 1252-53 & n.39; *McIlroy*, 732 F.2d at 105; *Haddad*, 720 F.2d at 1459. These cases do not stand for the proposition that, in civil cases, the party aggrieved by a federal constitutional error may be saddled with the burden of proving that the error was harmful. Indeed, the Ninth Circuit recently relied on *Haddad* in holding that "presuming prejudice, rather than harmlessness is required by Supreme Court precedent" in civil as well as criminal cases, and expressly equated the *Haddad* standard with the *Kotteakos* standard. *Obrey*, 400 F.3d at 699-701. The bottom line on this score is that, regardless of semantic differences among the federal courts of appeals on the formulation of the harmless-error standard, none of those courts requires the party aggrieved by a constitutional error to prove prejudice in either the civil or the criminal context.

compared to the criminal context."). Certainly *Chapman v. California*, 386 U.S. 18 (1967)—the seminal case on the application of harmless-error analysis to federal constitutional errors—does not suggest any such distinction. Although *Chapman* happened to be a criminal case, it did not remotely limit its analysis to the criminal context. To the contrary, *Chapman* considered the question whether a federal constitutional error could *ever* be harmless, and held as a matter of federal constitutional law that it could—provided that "the beneficiary of [the] constitutional error" could so establish. 386 U.S. at 24.

Respondents try to sidestep this point by insisting that the burden is irrelevant here because the Pennsylvania appellate court "twice *found* a total absence of prejudice." Opp. 33 (emphasis added). But the Pennsylvania appellate court made no such "finding." Rather, the Pennsylvania appellate court merely held that "[petitioner] has failed to demonstrate that it suffered any prejudice" from the constitutionally invalid punitive damages claim. Pet. App. 5a; *see also* Pet. App. 9a ("[Petitioner] has failed to show prejudice."). The Pennsylvania appellate court, in other words, clearly based its decision on its conclusion that *petitioner* failed to carry its alleged burden of proof. Respondents thus miss the point by arguing now that the federal constitutional error was harmless, and that "the outcome would be the same even if [respondents] had the burden of showing harmlessness." Opp. 34.[2] Such self-serving speculation

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[2] Respondents repeatedly insist that the error must have been harmless because the verdict form did not use the words "punitive damages." *See, e.g.*, Opp. 14-15, 34. Indeed, apparently based on this semantic point, respondents go so far as to assert that "the jury did not decide punitive liability ... in the compensatory phase." Opp. 34. That assertion is plainly incorrect: the verdict form specifically asked the jury to decide whether petitioner's conduct was "willful or wanton or with

gets respondents nowhere, because that call is for a court—not respondents themselves—to make. By definition, no court could have decided that respondents carried their burden of proving that the federal constitutional error here was harmless, because no court ever put respondents to the test.

Respondents also miss the point by arguing over whether the federal constitutional error here was "structural" (requiring automatic reversal), or a mere "trial error" (requiring respondents to prove harmlessness). *See* Opp. 26-32. In no event is the right answer that petitioner, the party aggrieved by the federal constitutional error, bears the burden of showing that the error was harmful. Thus, even if respondents were correct that the error here was not "structural"—and they are not, for the reasons set forth in the petition, *see* Pet. 12-14 & n.6—the fact remains that the Pennsylvania appellate court still erred by relieving them of their burden of proving that the federal constitutional error was harmless.

The bottom line here is that this case provides this Court with an opportunity to clarify an important and recurring point of federal constitutional law that should have been settled at least since *Chapman*: that federal constitutional errors are presumptively harmful, not

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reckless indifference to the rights of [Gallagher]," Pa.Rec. 1383, the predicate for an award of punitive damages. By answering that question in the affirmative, the jury decided that respondents were entitled to punitive damages, so that the only question left was the amount of such damages (which was decided in a later proceeding). The jurors were not told that there would be a later proceeding, and nothing kept them from inflating the damages awarded in the first stage of the proceeding to account for their finding that petitioner's conduct was "willful or wanton or with reckless indifference to the rights of [Gallagher]." *Id.*

harmless. The fact that respondents seek to limit that point to the criminal context, fully 40 years after *Chapman*, only underscores the need for guidance. It certainly devalues federal constitutional rights, like the right recognized in *State Farm* not be to subjected to punitive damages based on conduct independent of the acts upon which liability is premised, to deem the denial of such rights presumptively harmless. Because respondents were not required to prove that the *State Farm* error in this case did not infect the $20 million judgment in their favor, that judgment is constitutionally invalid and cannot stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either summarily reverse the judgment or set the case for plenary review.

Respectfully submitted,

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